

PROSECUTING JUVENILES AS ADULTS
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I. JURISDICTIONAL BASIS FOR PROSECUTING JUVENILES

A. Background / Overview

From December 9, 1960 through December 5, 1996, Ariz. Const. art. 6, § 15 vested the superior court with exclusive original jurisdiction “in all proceedings and matters affecting dependent, neglected, incorrigible or delinquent children, or children accused of crime, under the age of eighteen years.” *In re Cameron T.*, 190 Ariz. 456, 458 (App. 1997). Arizona case law referred to this provision as the source of the superior court’s authority to transfer juveniles for prosecution as adults, and the refusal to suspend criminal prosecution was interpreted as a waiver of jurisdiction by the juvenile court so as to transfer the child for prosecution as an adult. *Id.*; *State v. Jiminez*, 109 Ariz. 305, 306 (1973); *State ex rel Romley v. Superior Court*, 174 Ariz. 126, 128 (App.1993). Guidelines for the exercise of a waiver of jurisdiction by the juvenile court were found in former Rules 12 through 14, Rules of Procedure for the Juvenile Court. Former Rule 12 permitted the county attorney to request the transfer of a juvenile for prosecution as an adult; upon such request the juvenile probation officer was to conduct a transfer investigation and the court could order a mental and/or physical examination of the juvenile. Under former Rule 14, the court conducted a transfer hearing to determine whether there was probable cause to believe that the juvenile committed the acts alleged, and whether the juvenile should be transferred. *Id.*

When Proposition 102, the "Juvenile Justice Initiative," became law on December 6, 1996, Ariz. Const. art. 6 § 15 was revised to read: “The jurisdiction and authority of the courts of this state in all proceedings and matters affecting juveniles shall be as

provided by the legislature or the people by initiative or referendum.” Also effective on December 6, 1996, Ariz. Const. art. 4, pt. 2, § 22 provided:

In order to preserve and protect the right of the people to justice and public safety, and to ensure fairness and accountability when juveniles engage in unlawful conduct, the legislature, or the people by initiative or referendum, shall have the authority to enact substantive and procedural laws regarding all proceedings and matters affecting such juveniles. The following rights, duties, and powers shall govern such proceedings and matters:

- (1) Juveniles 15 years of age or older accused of murder, forcible sexual assault, armed robbery or other violent felony offenses as defined by statute shall be prosecuted as adults. Juveniles 15 years of age or older who are chronic felony offenders as defined by statute shall be prosecuted as adults. Upon conviction all such juveniles shall be subject to the same laws as adults, except as specifically provided by statute and by article 22, section 16 of this constitution. All other juveniles accused of unlawful conduct shall be prosecuted as provided by law. Every juvenile convicted of or found responsible for unlawful conduct shall make prompt restitution to any victims of such conduct for their injury or loss.

Cameron T., 190 Ariz. at 458.

Proposition 102 thus amended the Constitution by allowing the legislature to limit the power of the courts to suspend prosecution of a juvenile as an adult and by limiting the jurisdiction of the courts to those juvenile matters that are provided by the legislature or the people. *Cameron T.*, 190 Ariz. at 459. The express intent of the amendment was to preserve and protect the right of the people to justice and public safety, and to ensure fairness and accountability when juveniles engage in unlawful conduct. It was designed to make possible more effective and more severe responses to juvenile crime. *McGuire v. Lee*, 239 Ariz. 384, ¶ 8 (App. 2016)(15-year-old subject to prosecution as an adult for acting as a lookout in an armed robbery with a toy gun). The effect of the amendment was to divest the juvenile courts of jurisdiction over certain juvenile offenders. *State v.*

Davolt, 207 Ariz. 191, 214, ¶ 100 (2004). Under the amendment and ensuing legislation, older juvenile offenders accused of violent crimes became subject to the adult criminal system, unless specifically excepted. *State v. Oaks*, 209 Ariz. 432, 435, ¶ 13 (App. 2004)(juvenile charged as adult with a violent offense under § 13-501 and with having committed the offense recklessly is held to the standard of a reasonable person, not a reasonable juvenile of the same age as the juvenile charged).

A.R.S. § 13-501 was enacted in 1997 in order to effectuate and implement article 4, pt. 2, § 22 of the Arizona Constitution. *State v. Lee*, 236 Ariz. 377, 382, ¶ 15 (App. 2014). A.R.S. § 13-501(A) *requires* the State to bring a criminal prosecution against juveniles age 15 and over accused of certain enumerated crimes or who are chronic felony offenders, as mandated by Ariz. Const. art. 4, pt. 2, § 22. “Such transfer is now mandatory for the offenses listed; the cases are filed directly in the superior court, and the juvenile court never acquires jurisdiction. *Cameron T.*, 190 Ariz. at 461.

Proposition 102 left undisturbed the superior court’s jurisdiction over “[c]ases and proceedings in which exclusive jurisdiction is not vested by law in another court,” and over “[c]riminal cases amounting to felony, and cases of misdemeanor not otherwise provided for by law.” Ariz. Const. art. 6, § 14(1), (4); *see generally State v. Marks*, 186 Ariz. 139, 141-42 (App.1996)(finding that Article 6, § 14(4) vests jurisdiction in “superior court at large” over a juvenile’s conduct violating felony statute). Accordingly, after Proposition 102, juveniles accused of crime were no longer constitutionally limited to the juvenile adjudication and disposition process, which previously subjected them only to discretionary transfer for adult prosecution. Proposition 102 replaced the juvenile court’s constitutional “exclusive original jurisdiction” with the general rule that the superior

court's jurisdiction over matters affecting juveniles shall be provided by statute, and that all juveniles accused of crimes not within the designated categories shall be prosecuted "as provided by law." *Cameron T.*, 190 Ariz. at 461-462.

In the wake of these constitutional changes, the legislature also enacted A.R.S. §§ 8-302(B) and 13-501(B), which vest exclusive authority in the State to determine whether juveniles in specified circumstances will be tried as adults. *Andrews v. Willrich*, 200 Ariz. 533, 534, ¶ 1 (App. 2001). These statutes do not violate the doctrine of separation of powers, nor do they violate the due process rights of juveniles by subjecting them to criminal prosecution without benefit of a transfer hearing. *Id.* at 539, ¶ 24. "Indeed, our constitution clearly provides that juvenile offenders do not possess rights to be adjudicated in juvenile court." *Id.* at ¶ 23. The juvenile court may still exercise exclusive jurisdiction and be required to hold transfer hearings when the county attorney seeks adult prosecution in instances not covered under A.R.S. § 13-501; such hearings are now provided under A.R.S. § 8-327, which provides the same criteria for making such determinations as that provided under former Juvenile Rule 14. The same criteria must be considered by the criminal court under A.R.S. § 13-504(D) in determining whether a juvenile who is charged as an adult in the State's discretion under § 13-501(B) should be transferred to the juvenile court for prosecution.

But after the amendment of the Arizona Constitution and the enactment of A.R.S. § 13-501, the juvenile court is no longer required to do so for prosecutions brought under that statute. The juvenile court and the superior court now have concurrent jurisdiction over juveniles who commit crimes under A.R.S. § 13-501(B). When the county attorney brings a prosecution under that statute, "the juvenile court has [the]

authority to terminate its jurisdiction over a juvenile ... and the superior court has statutory and constitutional jurisdiction over felonies and misdemeanors committed by juveniles who are no longer under the jurisdiction of the juvenile court.” Therefore, when the county attorney chooses to prosecute a juvenile pursuant to A.R.S. § 13-501(B), A.R.S. § 8-302(C) *requires* the juvenile court to dismiss any juvenile delinquency petition alleging the same crimes. *In re Timothy M.*, 197 Ariz. 394, 400, ¶ 24 (App. 2000). See also A.R.S. § 8-202(H)(2) (“Persons who are under eighteen years of age shall be prosecuted in the same manner as adults if . . . [t]he juvenile is charged as an adult with an offense listed in § 13-501.”)

The legislature also provided a mechanism for transferring a juvenile case erroneously filed in adult criminal court to the juvenile court. A.R.S. § 8-302(A) provides, “If during the pendency of a criminal charge . . . the court determines that the defendant is a juvenile who is not subject to prosecution as an adult pursuant to § 13-501, the court shall transfer the case to the juvenile court, together with all of the original accusatory pleadings and other papers, documents and transcripts of any testimony relating to the case.” [See Transfer between Juvenile and Criminal Court: § 8-302, *infra*.] The legislature also later provided a mechanism for the criminal trial court to transfer discretionary direct file cases to the juvenile court; A.R.S. § 13-504 provides that juveniles criminally prosecuted pursuant to A.R.S. § 13-501(B) may be transferred to juvenile court after a hearing held either (A) on motion of a juvenile or on the court’s own motion, or (B) if the crime was committed more than 12 months before the date of the filing of the criminal charge. [See Transfer to Juvenile Court, *infra*.]

But it has always been – and remains – the case that a juvenile improperly prosecuted as an adult who nonetheless proceeds with the criminal prosecution without objection waives the personal jurisdiction of the juvenile court – and any right to be prosecuted only as a juvenile delinquent. [See Waiver of Personal Jurisdiction, *infra*.]

B. Age 18 as Jurisdictional Restriction

“Adult” means a person who is eighteen years of age or older. A.R.S. § 8-201(3). “Child,” “youth” or “juvenile” means an individual who is under the age of eighteen years. A.R.S. § 8-201(6). The juvenile court retains jurisdiction over a delinquent juvenile “until the child becomes eighteen years of age, unless terminated by order of the court before the child's eighteenth birthday.” A.R.S. § 8-202(G); *see also* Ariz. Const. art. 6, § 15 (state courts’ jurisdiction over matters affecting juveniles is as provided by legislature or people by initiative or referendum). A.R.S. § 8-202(G) limits the extent of the juvenile court’s jurisdiction over a juvenile to implement the orders made and filed in a proceeding” to the earlier of either the juvenile's eighteenth birthday or the termination of jurisdiction by order of the court. *Andrew G. v. Peasley-Fimbres*, 216 Ariz. 204, 206, ¶ 8 (App. 2007).

Despite the sea change within both the juvenile and criminal court systems regarding the prosecution of juveniles as adults, it remains axiomatic that once a juvenile reaches the age of 18, the juvenile court lacks jurisdiction. *McBeth v. Rose*, 111 Ariz. 399, 402 (1975). Any retention of jurisdiction referred to by statute “is limited to those persons whom the juvenile court has adjudicated as delinquent or dependent *prior to* their reaching their eighteenth birthday.” *Id.* (Emphasis added.) Thus, “When such a person is no longer a child under the age of eighteen the juvenile court has no

jurisdiction to try him.” *Id.* See also *Pima County Juvenile Action No. J-70107-2*, 149 Ariz. 35, 36 (1986)(juvenile court jurisdiction terminates upon juvenile's 18th birthday); *State v. Superior Court of Pima County*, 7 Ariz.App. 170, 176 (App. 1968)(defendant who failed to assert rights as juvenile and pleaded guilty to criminal charge was not entitled to dismissal; case could not be transferred because defendant was now 18 and beyond juvenile court jurisdiction); *Burrows v. State*, 38 Ariz. 99, 110-111 (1931), *overruled on other grounds* (purpose of Arizona juvenile law is to provide a special method of treatment for minors under the age of 18 who have violated the criminal law; Juvenile Code does not apply once juvenile reaches the age of 18).

1. Continuing Jurisdiction

In *Maricopa County Juvenile No. J-86509*, 124 Ariz. 377, 379 (1979), the Arizona Supreme Court struck down as unconstitutional a statute providing the juvenile court and the Department of Juvenile Corrections continuing jurisdiction over a person past the age of 18, noting there was neither constitutional nor statutory authority for treating persons over 18 years as children. Moreover: “This extension of jurisdiction beyond age eighteen results in a classification which discriminates between adults.” *Id.*

The Arizona Constitution has since been amended and continuing jurisdiction past age 18 is again permitted, but only in the context of juvenile probation. However, the juvenile court’s jurisdiction must be initiated *before* the juvenile turns 18 years.

A.R.S. § 8-341(N) provides:

Notwithstanding any law to the contrary, if a person is under the supervision of the court as an adjudicated delinquent juvenile at the time the person reaches eighteen years of age, treatment services may be provided until the person reaches twenty-one years of age if the court, the person and the state agree to the provision of the treatment and a motion

to transfer the person pursuant to § 8-327 has not been filed or has been withdrawn. The court may terminate the provision of treatment services after the person reaches eighteen years of age if the court determines that any of the following applies:

1. The person is not progressing toward treatment goals.
2. The person terminates treatment.
3. The person commits a new offense after reaching eighteen years of age.
4. Continued treatment is not required or is not in the best interests of the state or the person.

But this is not available for juveniles charged with misdemeanors, petty offenses or civil traffic violations. A.R.S. § 8-302(D) provides:

If a juvenile reaches eighteen years of age during the pendency of a delinquency action or before completion of the sentence in any court in this state for an act that if committed by an adult would be a misdemeanor or petty offense or a civil traffic violation, the court shall transfer the case to the appropriate criminal court, together with all of the original accusatory pleadings and other papers, documents and transcripts of any testimony relating to the case and any sentencing order. The appropriate criminal court shall then proceed with all further proceedings as if a uniform Arizona traffic ticket and complaint form or a complaint alleging a misdemeanor or petty offense or a civil traffic violation had been filed with the appropriate criminal court pursuant to § 13-3903 or the Arizona rules of criminal procedure, the rules of procedure in traffic cases or the rules of procedure in civil traffic violation cases.

Conversely, a juvenile convicted as an adult in criminal court may be provided juvenile court services – but only while the juvenile defendant is under 18 years of age. A.R.S. § 13-921; A.R.S. § 13-501(F) ("Except as provided in § 13-921, a person who is charged pursuant to this section shall be sentenced in the criminal court in the same

manner as an adult for any offense for which the person is convicted."). [See Sentencing, Probation Dual Jurisdiction, *infra*]

Compare: *State v. Espinoza*, 229 Ariz. 421, 427, ¶ 24 (App. 2012)(criminal court lacked juvenile court jurisdiction to require criminal defendant over the age of 18 to register as sex offender based on prior adjudication of delinquency for sex crime in juvenile court), see also A.R.S. § 13-501(G)("Unless otherwise provided by law, nothing in this section shall be construed as to confer jurisdiction in the juvenile court over any person who is eighteen years of age or old.").

2. Waiver of Personal Jurisdiction

A court must have both subject matter and personal jurisdiction to render a valid criminal judgment and sentence. Personal jurisdiction may be waived; subject matter jurisdiction may not. *State v. Marks*, 186 Ariz. 139, 141 (App. 1996). In *Marks*, the juvenile was transferred by the juvenile court and convicted as an adult. He appealed, in separate actions, both the juvenile court's transfer order and his criminal conviction. The court of appeals affirmed the criminal conviction, but later set aside the juvenile court's transfer order. Marks then asked the court to vacate the conviction, complaining the criminal division of the superior court had no personal jurisdiction over him because the juvenile division's transfer proceeding was flawed. The court held that Marks waived personal jurisdiction by failing to raise it during his criminal trial or on appeal.

The court explained, first, whether treated as a crime or a delinquent act, Marks' conduct fell within the subject matter jurisdiction of the superior court at large. *Id.* at 142. Second, the superior court is a single unified trial court of general jurisdiction,

regardless of departmentalization.¹ Thus, the juvenile court sits as the juvenile division of the superior court when exercising the superior court's jurisdiction over children in any proceeding relating to delinquency, dependency or incorrigibility. *Id.* Third, the juvenile court's then-exclusive original jurisdiction over juvenile matters did not deprive the superior court at large of subject matter jurisdiction over a felony committed by a juvenile; instead, A.R.S. § 8-202 defined the point of origin within the superior court for the prosecution of a juvenile felony. Such a prosecution was to commence in a juvenile division, which – at that time – had to first make the threshold determination whether the prosecution should proceed as a delinquency in the juvenile division or be transferred to the criminal division and proceed as a crime. *Id.*

Thus, when the juvenile court's transfer procedures are flawed, the consequence is to deprive the criminal division of *personal* jurisdiction over an improperly transferred juvenile. “Specifically, the faulty transfer does not deprive the superior court of subject matter jurisdiction over the crime, but rather impairs the procedural foundation for subjecting the juvenile to the criminal procedures, standards, and penalties of trial as an adult.” *Id.* A defendant waives an objection based on lack of personal jurisdiction, however, by failing to object no later than 20 days prior to trial. “And although Rule 16.1(b) states, ‘[l]ack of jurisdiction may be raised at any time,’ this court has

¹ *But see State v. Espinoza*, 229 Ariz. 421, n. 3 (Div. 2 App. 2012) (“Given the terms of § 8-202, wherein the legislature specifically addresses the jurisdiction of the juvenile court and articulates concrete jurisdictional distinctions between it and superior courts sitting in their capacity to adjudicate adult criminal cases, we do not follow the conclusion of another division of this court suggesting there is no jurisdictionally relevant division between the two.”), citing *Marks*. See FN 4, *infra*.

interpretively restricted this part of the rule to subject matter jurisdiction and subjected objections to personal jurisdiction to the 20-day rule.” *Id.* The court concluded:

Were we to accept such an objection as timely at this stage, a juvenile could deliberately proceed to trial as an adult, hoping for acquittal, but reserving the possibility that, in the event of conviction, the trial would be invalidated by the ongoing juvenile appeal. Our law does not provide this option. The juvenile's motion comes too late. Because the defect is one of personal, not subject matter jurisdiction, it is waived. We therefore deny defendant's motion to vacate, and we permit the trial court's judgment and sentence to stand.

Id.

In *State v. Superior Court of Pima County*, 7 Ariz.App. 170, 176 (App. 1968), the 17-year-old defendant was charged, commenced trial, and then entered a guilty plea before the criminal court. After his 18th birthday, he moved to quash the information on the grounds that the criminal court lacked personal jurisdiction because he was a juvenile at the time of the proceedings. The court of appeals disagreed, noting the juvenile court never assumed jurisdiction over the defendant, and concluded that lack of personal jurisdiction is a defect that is waived by failure to raise it before entering a guilty plea. *Id.* at 175-176. Although the trial court still had discretion to allow withdrawal of the guilty plea, the Court declined to quash the information and held that if a motion to withdraw the plea was granted, the defendant could still be tried under the information previously filed in adult court. Since the defendant was now an adult, transfer to juvenile court was futile. *Id.* at 176-177.

Since Proposition 102, the point of origin within the superior court for prosecution of juvenile felonies includes A.R.S. § 13-501, under which the case commences directly in the criminal division of the superior court - and no transfer hearing is necessary. See *also* A.R.S. § 8-202(H)(2) (“Persons who are under eighteen years of age shall be

prosecuted in the same manner as adults if . . . [t]he juvenile is charged as an adult with an offense listed in § 13-501.") The juvenile court has no jurisdiction over a juvenile charged as an adult in this manner. However, note that after a discretionary direct file pursuant to A.R.S. § 13-501(B), A.R.S. § 13-504 requires the criminal court under certain circumstances to hold a hearing to determine whether the case should be transferred to juvenile court. [See Transfer to Juvenile Court, *infra*.]

This distinction between personal and subject matter jurisdiction, as well as the age-18 cutoff for juvenile court jurisdiction, is important to remember where a defendant raises jurisdictional and related claims for the first time only after turning 18. This can occur whenever there is an error in either criminal or delinquency proceedings; for example, where there is an error or dispute regarding the juvenile's true age, direct filing turns out to have been improper, or either the criminal or juvenile court err with respect to transfer proceedings (or the lack thereof).

II. DIRECT FILING

The voter-mandated 1996 amendment to the constitution adding article 4, pt. 2, § 22 was designed to make possible more effective and more severe responses to juvenile crime. Accordingly, it required the state to prosecute juveniles as adults in specified circumstances. The amendment created two categories of juveniles who must be prosecuted as adults: juveniles 15 years of age or older accused of murder, forcible sexual assault, armed robbery or other violent felony offenses as defined by the legislature, and chronic felony offenders, also as defined by the legislature. It left to the discretion of prosecutors the decision whether to prosecute as adults certain juveniles who are not chronic felony offenders and who commit non-violent offenses. The

legislature enacted § 13-501 in 1997 “in order to effectuate and implement” the constitutional amendment. *McGuire v. Lee*, 239 Ariz. 384, ¶ 8, 330-331 (App. 2016).

The corollary in the Juvenile Code, A.R.S. § 8-302(C), provides: "During the pendency of a delinquency action, on the motion of the prosecution and before the adjudication hearing, the court shall dismiss without prejudice any count in the petition charging an offense for which the juvenile is subject to prosecution as an adult pursuant to § 13-501 to allow criminal charges to be filed."

A. Mandatory Direct File: § 13-501(A)

A.R.S. § 13-501(A) provides that the court attorney *shall* bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is 15, 16, or 17 years of age at the time the alleged offense is committed, and the juvenile is accused of any of the following offenses:

1. First degree murder in violation of § 13-1105.
2. Second degree murder in violation of § 13-1104.
3. Forcible sexual assault in violation of § 13-1406.
4. Armed robbery in violation of § 13-1904.

- Armed robbery committed with a simulated deadly weapon is included under A.R.S. § 13-501(A)(4) as a mandatory direct file offense. The legislature did not limit the application of § 13-1904 in § 13-501(A)(4) to robbery committed while the person or an accomplice is armed with an actual deadly weapon or uses or threatens to use a deadly weapon or dangerous instrument. *McGuire v. Lee*, 239 Ariz. 384, ¶ 12 (App. 2016)(15-year-old was subject to prosecution as an adult for acting as a lookout in an armed robbery with a toy gun). Moreover, the legislature generally views armed robbery as a violent offense even if based on a simulated weapon. *Id.*, ¶ 19.

5. Any other violent felony offense.

6. Any felony offense committed by a chronic felony offender.

7. Any offense that is properly joined to an offense listed in this subsection.

Further, under A.R.S. § 13-501(C), a criminal prosecution *shall* be brought against a juvenile in the same manner as an adult if the juvenile has been accused of a criminal offense and has a historical prior felony conviction.

The following definitions are set forth under A.R.S. § 13-501(H):

1. “Accused” means a juvenile against whom a complaint, information or indictment is filed.

2. “Chronic felony offender” means a juvenile who has had two prior and separate adjudications and dispositions for conduct that would constitute a historical prior felony conviction if the juvenile had been tried as an adult.

3. “Forcible sexual assault” means sexual assault pursuant to § 13-1406 that is committed without consent as defined in § 13-1401(7)(a).

4. “Other violent felony offense” means:

(a) Aggravated assault pursuant to § 13-1204(A)(1).

(b) Aggravated assault pursuant to § 13-1204(A)(2) involving the use of a deadly weapon.

(c) Drive by shooting pursuant to § 13-1209.

(d) Discharging a firearm at a structure pursuant to § 13-1211.

A juvenile who must be charged as an adult with a violent offense under § 13-501, and with having committed the offense recklessly, is held to the standard of a reasonable person – not a reasonable juvenile of the same age as the juvenile charged. *State v. Oaks*, 209 Ariz. 432, 436, ¶ 18 (App. 2004). The stated intent of Proposition

102 was to make possible more effective and more severe responses to juvenile crime; the effect of Ariz. Const. art. 4, pt. 2, § 22 and A.R.S. § 13-501 was to subject older juvenile offenders accused of violent crimes to the adult criminal system, unless specifically excepted. Applying the objective standard for recklessness to older juveniles tried as adults thus furthers the voters' and the legislature's intent and is consistent with the other provisions requiring such juveniles to be treated as adults. *Id.* at 435, ¶¶ 11-13. Compare, *In re William G.*, 192 Ariz. 208, 214 (App.1997)(evaluating recklessness under juvenile standard when property damage caused by juvenile riding in shopping cart, but “reserv[ing] judgment on any future case that concerns significantly different activity by juveniles,” and excluding inherently dangerous conduct from scope of decision).

1. Chronic Felony Offenders

Under A.R.S. § 13-501(A)(6), the county attorney *shall* bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is 15, 16, or 17 years of age and is accused of any felony offense committed by a chronic felony offender. A.R.S. § 13-501(H)(2) defines a “chronic felony offender” as “a juvenile who has had two prior and separate adjudications and dispositions for conduct that would constitute a historical prior felony conviction if the juvenile had been tried as an adult.” *State v. Lee*, 236 Ariz. 377, 383, ¶¶ 17-18 (App. 2014). Juvenile statute A.R.S. § 8-341, setting forth disposition alternatives for juveniles adjudicated delinquent, is consistent with and complements § 13-501(H)(2). A.R.S. § 8-341(C) and (E) provide that first-time or repeat felony offenders must be given notice of the consequences of the felony adjudications. A.R.S. § 8-341(V)(1) defines a first-time felony offender as a “juvenile

who is adjudicated delinquent for an offense that would be a felony offense if committed by an adult.” And A.R.S. § 8-341(V)(2) defines repeat felony offender as a juvenile “adjudicated delinquent for an offense that would be a felony offense if committed by an adult” and who had already “been adjudicated a first time felony juvenile offender.” *Lee*, 236 Ariz. at 383, ¶ 19.

A "historical prior conviction" is defined under A.R.S. § 13-105(22) as follows:

(a) Any prior felony conviction which either: (i) mandated a term of imprisonment, except a drug offense below the threshold amount; (ii) involved a dangerous offense; (iii) involved the illegal control of a criminal enterprise; (iv) involved aggravated DUI; or (v) involved any dangerous crime against children as defined in § 13-705.

(b) Any class 2 or 3 felony, except offenses listed in subdivision (a), committed within 10 years immediately preceding the date of the present offense, excluding any time spent on absconder / escape status or incarcerated.

(c) Any class 4, 5 or 6 felony, except offenses listed in subdivision (a), committed within 5 years immediately preceding the date of the present offense, excluding any time spent on absconder / escape status or incarcerated.

(d) Any felony conviction that is a third or more prior felony conviction, including any offense committed outside Arizona that was a felony in the other jurisdiction.

(e) Any offense committed outside Arizona punishable by another jurisdiction as a felony committed within the 5 years immediately preceding the date of the present offense, excluding any time spent on absconder / escape status or incarcerated.

(f) Any offense committed outside Arizona that involved the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or

knowing infliction of death or serious physical injury, and that was a felony in the other jurisdiction. But this does not apply if the offense would not be punishable as a felony under Arizona law.

Note that in criminal cases, each new complaint or indictment gets a discrete case number and court file; a defendant's prior convictions thus normally have different cause numbers and court files. However, in juvenile court there is but one cause number and court file for each juvenile, and this file includes every delinquency petition brought against that juvenile. Thus, multiple petitions alleging separate offenses committed on different dates are all in the same file under the same cause number. Nonetheless, each petition counts as a "prior and separate" adjudication. *State v. Lee*, 236 Ariz. 377, 381, ¶¶ 10-11 (App. 2014)(prior felony adjudications were separate and distinct even though the adjudications appeared under one cause number; the minute entries showed that the juvenile court had distinguished and identified the petitions and the charges in each by the different dates on which the petitions were filed, and that the juvenile was provided with first and repeat felony offender notices).

Class 6 felonies may be the basis for finding a juvenile a chronic felony offender under § 13-501. Although A.R.S. § 13-604 gives judges and prosecutors discretion to designate class 6 felonies as misdemeanors, this does not change the nature and class of an offense upon conviction or adjudication. Thus, the possibility that the State could have charged a class 6 felony as a misdemeanor does not alter the felony designation of the offense. *State v. Lee*, 236 Ariz. 377, 383-85, ¶¶ 20-27 (App. 2014)(trial court erred in requiring State to establish, in light of policy of charging adults committing

similar offenses with misdemeanors, that juvenile would have been charged with felonies had he been an adult when he committed these offenses).

i. Jurisdictional Basis

The jurisdictional basis for the direct filing of chronic felony offenders is set forth in § 13-501(D) and (E):

D. At the time the county attorney files a complaint or indictment the county attorney shall file a notice stating that the juvenile is a chronic felony offender. Subject to subsection E of this section, the notice shall establish and confer jurisdiction over the juvenile as a chronic felony offender.

E. Upon motion of the juvenile the court shall hold a hearing after arraignment and before trial to determine if a juvenile is a chronic felony offender. At the hearing the state shall prove by a preponderance of the evidence that the juvenile is a chronic felony offender. If the court does not find that the juvenile is a chronic felony offender, the court shall transfer the juvenile to the juvenile court pursuant to § 8–302. If the court finds that the juvenile is a chronic felony offender or if the juvenile does not file a motion to determine if the juvenile is a chronic felony offender, the criminal prosecution shall continue.

These provisions are discussed at length in *State v. Rodriguez*, 205 Ariz. 392 (App. 2003). There, the State charged Rodriguez as a juvenile chronic felony offender but did not file the notice required under § 13-501(D); however, a hearing was still held pursuant to § 13-501(E). Citing *State v. Marks*, 186 Ariz. 139, 142 (App.1996), Rodriguez complained the trial court lacked personal jurisdiction over him. The court of appeals held the controlling inquiry in determining personal jurisdiction under those subsections is whether the juvenile is a chronic felony offender. The obvious purpose of (D)'s notice requirement is to notify the juvenile offender that the State seeks to prosecute him as an adult because of his alleged chronic-felony-offender status. If a notice is filed pursuant to (D) and the juvenile does not request a hearing under (E), the

notice itself establishes and confers jurisdiction over the juvenile as a chronic felony offender. But if that notice is not filed with the indictment and the juvenile nonetheless receives a hearing pursuant to subsection (E) and is found to be a chronic felony offender, as happened in that case, that finding suffices to establish the court's personal jurisdiction over the juvenile as an adult. *Id.* at 396-397, ¶¶ 9-14.

The Court concluded although the failure to file the notice violated the directive of § 13-501(D), that failure did not ultimately deprive the superior court of personal jurisdiction over Rodriguez; despite the lack of notice, Rodriguez was aware of the State's allegation and received a hearing. *Id.* at 397, ¶ 15. And although § 13-501(D) includes the mandatory language, "shall," a violation of mandatory language, when no sanction is provided, requires a showing of prejudice before imposing sanctions or remedial action. Thus, the State's failure to file the notice did not mandate reversal, absent a showing that Rodriguez was thereby prejudiced. Since Rodriguez received the § 13-501(E) hearing to which he was entitled, he suffered no prejudice. Further, the trial court's finding that Rodriguez was a chronic felony offender established the court's jurisdiction over him as an adult. *Id.* at 397, ¶¶ 16-17.

ii. Sufficiency of evidence

Whether a juvenile is a chronic felony offender is a finding of fact for the trial court to make, and the reviewing court will defer to the trial court's factual findings that are supported by the record and not clearly erroneous. *State v. Lee*, 236 Ariz. 377, 382, ¶ 14 (App. 2014), citing *State v. Rodriguez*, 205 Ariz. 392, 398, ¶ 18 (App. 2003).

A juvenile who does not object to either the nature or the sufficiency of the State's evidence waives any argument that the State's evidence establishing him as a

chronic felony offender was inadequate. *State v. Rodriguez*, 205 Ariz. 392, 398, ¶¶ 19-21 (App. 2003). In *Rodriguez*, the State filed copies of juvenile court minute entries to demonstrate his status as a chronic felony offender; at the § 13-501(E) hearing, defense counsel acknowledged receiving minute entries verifying Rodriguez would qualify as a chronic felony offender. The State did not introduce the minute entries into evidence, the trial court did not take judicial notice of them, and the parties did not stipulate to any facts. Rodriguez complained on appeal that the State was required to present certified copies of his juvenile court adjudications and prove he was the same person who had committed the prior crimes; *i.e.*, the same procedure for establishing a prior felony conviction for sentence enhancement purposes in adult court. The court of appeals disagreed, noting the trial court was not enhancing his sentence based on the prior adjudications, but rather making a pretrial factual finding on his chronic-felony-offender status. The Court held since Rodriguez did not object to either the nature or sufficiency of the state's evidence, essentially agreed the minute entries established his chronic-felony-offender status, and did not contest that he was the same person named in those minute entries, he waived any claim that the State's evidence under § 13-501(E) was inadequate. Moreover, he had conceded in a previously filed motion both his date of birth and his previous adjudications of delinquency. *Id.*

Finally, the Court held although being prosecuted as an adult potentially involves more severe consequences, the mere exposure to adult prosecution does not constitute

enhanced punishment or offend *Apprendi*². *State v. Rodriguez*, 205 Ariz. 392, 399-400, ¶ 26 (App. 2003), citing *United States v. Juvenile*, 228 F.3d 987, 990 (9th Cir.2000)(no analogy between transfer statute mandating that juveniles with certain prior adjudications be tried as adults and statutes increasing the potential penalties in adult criminal cases; transfer statute did not increase punishment but merely established basis for adult court jurisdiction). A court's finding that a juvenile is a chronic felony offender thus does not subject that juvenile to enhanced punishment, but rather subjects the juvenile to the adult criminal justice system. As such, § 13-501(E) is not constitutionally defective under *Apprendi*. *Id.* at 400, ¶ 33.

B. Discretionary Direct File: § 13-501(B)

A.R.S. § 13-501(B) provides that the county attorney *may* bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is at least 14 years of age at the time the alleged offense is committed and accused of any of the following offenses:

1. A class 1 felony.
2. A class 2 felony.
3. A class 3 felony in violation of any offense in chapters 10-17, 19 or 23.
4. A class 3, 4, 5 or 6 felony involving a dangerous offense.
5. Any felony offense committed by a chronic felony offender.
6. Any offense that is properly joined to an offense listed in this subsection.

² *Apprendi v. New Jersey*, 530 U.S. 466 (2000)(other than prior conviction, any fact that increases penalty for crime beyond prescribed statutory maximum must be submitted to jury and proved beyond reasonable doubt).

The State also has discretion to transfer the case to juvenile court after having charged the juvenile as an adult. A.R.S. § 8-302(B) provides: "If during the pendency of a criminal charge the court determines the defendant is a juvenile subject to prosecution as an adult pursuant to § 13-501(B), on motion of the prosecutor the court *shall* transfer the case to the juvenile court, together with all of the original accusatory pleadings and other papers, documents and transcripts of any testimony relating to the case."

The legislature did not usurp the judiciary's powers by enacting §§ 8-302(B) and 13-501(B) and enabling the executive branch to decide whether to charge and prosecute specified juvenile offenders as adults. The objective of those statutes is to enable prosecutors to decide whether juvenile offenders, under circumstances outlined by the legislature, are tried as adults or adjudicated in juvenile court; although this goal allows the prosecutor to effectively select the sentencing scheme used to punish such offenders, it does not permit the prosecutor to predetermine the penalty ultimately imposed by the court. Further, although the courts must sentence juvenile offenders as adults if the prosecutor chooses to charge them as adults, the judiciary does not possess unfettered power at sentencing; instead, the sentencing function is limited by legislative enactment and the charging decision. Because the judiciary's right to fashion a sentence from the available range of penalties remains undisturbed, these provisions do not violate the doctrine of separation of powers under Article 3 of the Arizona Constitution. *Andrews v. Willrich*, 200 Ariz. 533, 537- 538, ¶¶ 19-21 (App. 2001).

Nor do these provisions violate due process in not providing notice or an opportunity to be heard before a prosecutor either charges a juvenile offender as an adult or refuses a request for transfer to the juvenile court. Due process requires a

meaningful opportunity to be heard only when a person may be deprived of life, liberty, or property. There is no identifiable liberty interest that may be deprived by the prosecutor's exercise of discretion pursuant to §§ 8-302(B) or 13-501(B). Indeed, our constitution clearly provides that juvenile offenders do not possess rights to be adjudicated in juvenile court. Thus, due process does not require that a juvenile offender be afforded notice and an opportunity to be heard either before the prosecutor elects to charge him as an adult under § 13-501(B) or after refusing to move the court to transfer the case to the juvenile court pursuant to § 8-302(B). *Andrews v. Willrich*, 200 Ariz. 533, 538-39, ¶¶ 22-23 (App. 2001).

Compare Kent v. United States, 383 U.S. 541, 561-62 (1966)(when statute confers *right* to judicial determination of fitness for prosecution of juvenile as adult, due process requires determination be made with basic procedural protections afforded similar judicial decisions); *Matter of Appeal in Maricopa County, Juvenile Action No. JV127231*, 183 Ariz. 263, 902 P.2d 1367 (App. 1995)(due process requires that juvenile be allowed to question and cross-examine probation officer who prepares transfer report as to any bias, prejudice, or motivation that may have affected case analysis and assessment), citing *Kent*.

III. TRANSFER

A. Transfer between Juvenile and Criminal Court: § 8-302

A.R.S. § 8-302 provides as follows.

➤ (A) Where direct file is erroneous:

If during the pendency of a criminal charge the court determines the defendant is a juvenile who is not subject to prosecution as an adult pursuant to § 13-501, the court shall transfer the case to the juvenile court,

together with all of the original accusatory pleadings and other papers, documents and transcripts of any testimony relating to the case. On transfer, the court shall order that the defendant be taken to a place of detention designated by the juvenile court or to that court itself or shall release the juvenile to the custody of the juvenile's parent or guardian or any other person legally responsible for the juvenile. If the juvenile is released to the juvenile's parent or guardian or any other person legally responsible for the juvenile, the court shall require that the parent, guardian or other person bring the juvenile to appear before the juvenile court at a designated time. The juvenile court shall then proceed with all further proceedings as if a petition alleging delinquency had been filed with the juvenile court under § 8-301 on the effective date of the transfer. This subsection does not apply to a juvenile who is subject to prosecution pursuant to § 13-501 but who is convicted of an offense not listed in § 13-501. A.R.S. § 8-302(A).

- (B) Where State decides to transfer discretionary direct file under § 13-501(B) to juvenile court:

If during the pendency of a criminal charge the court determines the defendant is a juvenile subject to prosecution as an adult pursuant to § 13-501(B), *on motion of the prosecutor* the court shall transfer the case to the juvenile court, together with all of the original accusatory pleadings and other papers, documents and transcripts of any testimony relating to the case. On transfer, the court shall order that the juvenile be taken to a place of detention designated by the juvenile court or to that court itself or shall release the juvenile to the custody of the juvenile's parent or guardian or any other person legally responsible for the juvenile. If the juvenile is released to the juvenile's parent or guardian or any other person legally responsible for the juvenile, the court shall require that the parent, guardian or other person bring the juvenile to appear before the juvenile court at a designated time. The juvenile court shall then proceed with all further proceedings as if a petition alleging delinquency had been filed with the juvenile court under § 8-301 on the effective date of the transfer. A.R.S. § 8-302(B).

- See also: A.R.S. § 8-301(1): A proceeding under this chapter may be commenced by transfer of a case from another court as provided in § 8-302.

- (C) Where direct file under § 13-501 occurs after commencement of juvenile proceedings:

During the pendency of a delinquency action, on the motion of the prosecution and before the adjudication hearing, the court shall dismiss

without prejudice any count in the petition charging an offense for which the juvenile is subject to prosecution as an adult pursuant to § 13-501 to allow criminal charges to be filed. A.R.S. § 8-302(C). [See case law below.]

- (D) Where juvenile turns 18 while pending a misdemeanor, petty offense, or civil traffic citation in juvenile court.

If a juvenile reaches 18 years during the pendency of a delinquency action or before completion of the sentence in any court in this state for an act that if committed by an adult would be a misdemeanor or petty offense or a civil traffic violation, the court shall transfer the case to the appropriate criminal court, together with all of the original accusatory pleadings and other papers, documents and transcripts of any testimony relating to the case and any sentencing order. The appropriate criminal court shall then proceed with all further proceedings as if a uniform Arizona traffic ticket and complaint form or a complaint alleging a misdemeanor or petty offense or a civil traffic violation had been filed with the appropriate criminal court pursuant to § 13-3903 or the Arizona rules of criminal procedure, the rules of procedure in traffic cases or the rules of procedure in civil traffic violation cases. A.R.S. § 8-302(D)

A.R.S. §§ 13-501(A) and (B) consistently entrust the filing of adult charges to the State. A.R.S. § 8-302(C) states that “during the pendency of a delinquency action in any court of this state,” that court “shall dismiss without prejudice” any count in a petition in which the juvenile is subject to prosecution as an adult. This requires the juvenile court to dismiss any charges pending at the time the State proceeded with those charges in the adult criminal court, even if a prior delinquency petition had been filed and was “pending.” To interpret the statutes otherwise would lead to the absurd result of having charges pending in two separate courts and raise possible issues of double jeopardy. *In re Timothy M.*, 197 Ariz. 394, 399-400, ¶23 (2000)

Further, no transfer hearing is required before the juvenile court dismisses delinquency proceedings pursuant to A.R.S. § 8-302(C). The State does not “grant” the juvenile court jurisdiction by filing a petition with that court – our statutes do that. Thus,

while the juvenile court may exercise exclusive jurisdiction and be required to hold transfer hearings when the State seeks adult prosecution in instances not covered under A.R.S. § 13-501, after the amendment of Article 6, § 15 of the Arizona Constitution and the enactment of A.R.S. § 13-501, it is no longer required to do so for prosecutions brought under that statute. The juvenile court and the superior court have concurrent jurisdiction over juveniles who commit crimes under A.R.S. § 13-501(B). When the State brings a prosecution under that statute, “the juvenile court has [the] authority to terminate its jurisdiction over a juvenile ... and the superior court has statutory and constitutional jurisdiction over felonies and misdemeanors committed by juveniles who are no longer under the jurisdiction of the juvenile court.” Thus, when the State chooses to prosecute the juvenile pursuant to A.R.S. § 13-501(B), A.R.S. § 8-302(C) requires the juvenile court to dismiss the petition. *In re Timothy M.*, 197 Ariz. 394, 400, ¶ 24 (2000), quoting *In re Cameron T.*, 190 Ariz. 456, 463 (App.1997).

Where the juvenile court defers acceptance of a plea at an advisory hearing pursuant to Juvenile Rule 28, there has been no adjudication. Therefore, the delinquency proceeding is still "pending" for purposes of § 8-302(C) and if the State files a motion to dismiss without prejudice in order to charge the juvenile as an adult, the court must do so under that statute. *In re Reymundo, F.*, 217 Ariz. 588, 591-92, ¶ 12 (App. 2008). To hold otherwise would deprive the State of its right, found in statute and rule, to seek a transfer of the juvenile for adult prosecution. *Id.* at 591, ¶ 9, citing *State v. Superior Court*, 180 Ariz. 384, 387-88 (App.1994)(prosecutor, not court, decides whether to proceed or not proceed with motion to transfer for adult prosecution, and

prosecutor has complete discretion in determining what charges to initiate against juvenile).

B. Discretionary Transfer TO Juvenile Court: § 13-504

Under A.R.S. § 13-504(A), if a juvenile is being prosecuted as an adult in the State's discretion pursuant to § 13-501(B), the court *must* hold a hearing to determine if jurisdiction of the criminal prosecution should be transferred to the juvenile court "on the motion of a juvenile or on the court's own motion." Under A.R.S. § 13-504(B), notwithstanding subsection A, the court *must* hold a hearing if a juvenile is prosecuted as an adult pursuant to § 13-501(B) "for an offense that was committed more than twelve months before the date of the filing of the criminal charge."

The court must find by *clear and convincing evidence* that public safety and the rehabilitation of the juvenile, if adjudicated delinquent, would be best served by transferring the prosecution to the juvenile court. A.R.S. § 13-504(C). If the court so finds, the court must order that the juvenile be taken to a place of detention designated by the juvenile court or to that court, or release the juvenile to the custody of the juvenile's parent or guardian. If the juvenile is released to the juvenile's parent or guardian, the court must require that the parent, guardian or other person bring the juvenile to appear before the juvenile court at a designated time. The juvenile court must proceed with all further proceedings as if a petition alleging delinquency had been filed with the juvenile court under § 8-301. *Id.*

Under A.R.S. § 13-504(D), the court must consider the following factors in determining whether public safety and the juvenile's rehabilitation, if adjudicated delinquent, would be served by the transfer:

1. The seriousness of the offense involved.
2. The record and previous history of the juvenile, including previous contacts with the court and law enforcement, previous periods of any court ordered probation and the results of that probation.
3. Any previous commitments of the juvenile to juvenile residential placements or other secure institutions.
4. Whether the juvenile was previously committed to the department of juvenile corrections for a felony offense.
5. Whether the juvenile committed another felony offense while the juvenile was a ward of the department of juvenile corrections.
6. Whether the juvenile committed the alleged offense while participating in, assisting, promoting or furthering the interests of a criminal street gang, a criminal syndicate or a racketeering enterprise.
7. The views of the victim of the offense.
8. Whether the degree of the juvenile's participation in the offense was relatively minor but not so minor as to constitute a defense to prosecution.
9. The juvenile's mental and emotional condition.
10. The likelihood of the juvenile's reasonable rehabilitation through the use of services and facilities that are currently available to the juvenile court.

Note, these are same factors as those provided under A.R.S. § 8-327 to determine whether a juvenile should be transferred from juvenile court for prosecution as an adult.

At the conclusion of the transfer hearing, the court must make a *written determination* whether the juvenile should be transferred to juvenile court. The court shall not defer the decision as to the transfer. A.R.S. § 13-504(E). This also mirrors the juvenile transfer statute, A.R.S. § 8-327(E).

- Note: the last sentence stating the court "shall not defer the transfer decision" means the court may not defer the transfer decision in order to consider subsequent conduct. This language was placed in A.R.S. § 8-327(E) by the legislature to foreclose the deferred transfer program added

by ASC as former Juvenile Rule 14.1 in response to the COA's holding that the juvenile court had no authority to continue a transfer hearing to consider subsequent conduct in making the transfer determination. See *State ex rel. Romley v. Superior Court*, 172 Ariz. 109, 112 (App. 1992) ("If the Arizona Supreme Court had intended to give the juvenile court the discretion to continue the transfer hearing so that it could consider the juvenile's subsequent conduct, it would have included a specific provision to this effect in [Rule 14]."); *Maricopa County Juvenile Action No. JV-511576*, 186 Ariz. 604, 607 (App. 1996) (counsel found ineffective for failing to argue for application of Rule 14.1, juvenile transfer deferral program). The deferred transfer program was the subject of numerous special actions; that last sentence was the legislative fix.

Rule 40, Ariz. R. Crim. P. provides the mechanism and the time limits for setting a transfer hearing:

a. Scope. This rule shall apply to defendants who are eligible for transfer to juvenile court pursuant to A.R.S. 13-501.01. [Now, A.R.S. § 13-501(B)]

b. Initiation. A hearing to determine whether prosecution of a defendant shall be transferred to juvenile court shall be initiated as follows:

1. upon motion of the defendant, or
2. upon an order of the court stating that a transfer hearing is either being set in the court's discretion or is required by law.

c. Contents of Motion and Court Order. The motion for transfer or the court order shall designate the offense or offenses that are the subject of the transfer hearing.

d. Time Limits.

1. *Request for Transfer.* The motion for transfer or the court order setting a transfer hearing shall be filed within forty-five days of the date of the arraignment.
2. *Hearing Date.* The transfer hearing shall be held within forty- five days of the filing of the motion for transfer or of the court order.

Issues that have arisen regarding § 13-504 include whether failure to hold a mandatory hearing before the juvenile turns 18 is a jurisdictional defect. There is currently a PR pending in ASC on that issue, as well as whether such failure violates due process. But currently there is no published case law. In *State v. Hocker*, 2 CA-CR

2015-0288-PR, 2015 WL 5945444 (App. Oct. 13, 2015), a memorandum decision³, the defendant pleaded guilty to attempted arson of an occupied structure; he was a juvenile at the time of his offense. He later sought post-conviction relief complaining that he was unlawfully denied a juvenile transfer hearing pursuant to A.R.S. § 13-504. The Court found he waived any such claim by pleading guilty, but stated: "Finally, we have found no Arizona authority suggesting that the failure to conduct a juvenile transfer hearing – even assuming Hocker was entitled to one – is a jurisdictional defect." *State v. Hocker*, 2 CA-CR 2015-0288-PR, 2015 WL 5945444, ¶ 7 (App. Oct. 13, 2015).

Another issue that has been raised is whether a criminal court's transfer order, made with no hearing, no finding by clear and convincing evidence, and no written decision, properly confers jurisdiction on the juvenile court, as well as what is the State's remedy when the court does so just before a juvenile's 18th birthday.

Finally, note that § 13-504 pertains to the criminal court's discretion to transfer a juvenile charged in the State's discretion as an adult under § 13-501(B) to the juvenile court. However, regardless of court discretion, the State has discretion to transfer such a filing to juvenile court under A.R.S. § 8-302(B)("If during the pendency of a criminal charge the court determines the defendant is a juvenile subject to prosecution as an adult pursuant to § 13-501(B), on motion of the prosecutor the court shall transfer the case to the juvenile court, together with all of the original accusatory pleadings and other papers, documents and transcripts of any testimony relating to the case.")

³Pursuant to Ariz. R. Sup. Ct. 111(c), this memorandum decision may be used for persuasive authority if no other opinion that adequately addresses the issue before the court. See AZ Brief – Revised, Citing Memorandum Decisions.

C. Discretionary Transfer FROM Juvenile Court: § 8-327

i. Basis for Juvenile Court Jurisdiction: § 8-202

The basis for the juvenile court's jurisdiction lies in A.R.S. § 8-202:

A. The juvenile court has *original* jurisdiction over all delinquency proceedings brought under the authority of Title 8.

B. The juvenile court has *exclusive* original jurisdiction over all proceedings brought under the authority of this title *except for delinquency proceedings*.

C. The juvenile court may consolidate any matter, except it shall not consolidate:

1. A criminal proceeding that is filed in another division of superior court that involves a child who is subject to the jurisdiction of the juvenile court.

2. A delinquency proceeding with any other proceeding that does not involve delinquency, unless the juvenile delinquency adjudication proceeding is not heard at the same time or in the same hearing as a non-delinquency proceeding.

D. The juvenile court has jurisdiction of proceedings to obtain judicial consent to the marriage, employment or enlistment in the armed services of a child, if consent is required by law.

E. The juvenile court has jurisdiction over both civil traffic violations and offenses listed in § 8-323 (B) committed within the county by persons under 18 years unless the presiding judge of the county declines jurisdiction of these cases. The presiding judge of the county may decline jurisdiction of civil traffic violations committed within the county by juveniles after finding the declination would promote the more efficient use of limited judicial and law enforcement resources located within the county. If the presiding judge declines jurisdiction, juvenile civil traffic violations shall be processed, heard and disposed of in the same manner and with the same penalties as adult civil traffic violations.

F. The orders of the juvenile court under the authority of this chapter or chapter 3 or 4 of Title 8 take precedence over any order of any other court of this state except the court of appeals and the supreme court to the extent that they are inconsistent with orders of other courts.

G. Except as otherwise provided by law, jurisdiction of a child that is obtained by the juvenile court shall be retained by it, for the purposes of implementing the orders made and filed in that proceeding, until the child becomes 18n years of age, unless terminated by order of the court before the child's 18th birthday.

H. Persons who are under eighteen years of age shall be prosecuted in the same manner as adults if either:

1. The juvenile court transfers jurisdiction pursuant to § 8-327.
2. The juvenile is charged as an adult with an offense listed in § 13-501.

The Legislature has, in § 8-202, expressly set forth a specific, and jurisdictionally relevant, subcategory of the superior court called the juvenile court. That court has original jurisdiction over all delinquency matters. By the terms of that jurisdiction-defining statute, the adult divisions of the superior court only acquire jurisdiction over those acts committed by a juvenile that are charged as offenses listed in A.R.S. § 13-501 or those offenses wherein “jurisdiction” has been specifically transferred pursuant to the criteria set forth in A.R.S. § 8-327. In short, the legislature has created a jurisdictional boundary, based primarily on the subject matter of the dispute (here, the type of offense), between a superior court acting in its capacity as a juvenile court and a superior court acting in its capacity as an adult court. *State v. Espinoza*, 229 Ariz. 421, 427, ¶ 23 (App. 2012)(criminal court lacked subject matter jurisdiction as either a juvenile court or an adult court over defendant's prior juvenile adjudication for attempted child molestation and thus could not order defendant to register as sex offender; court lacked jurisdiction as juvenile court because defendant was over 18, and lacked jurisdiction as adult court because attempted child molestation was not statutorily

itemized in § 13-501 nor had defendant's delinquency proceeding been transferred to adult division).⁴

ii. Discretionary Transfer to Adult Court: § 8-327

When a statute confers the right to a judicial determination of fitness for prosecution of juvenile as adult, due process requires that the determination be made with basic procedural protections afforded similar judicial decisions. *Kent v. United States*, 383 U.S. 541, 561-62 (1966). See also *Matter of Appeal in Maricopa County, Juvenile Action No. JV127231*, 183 Ariz. 263, 902 P.2d 1367 (App. 1995)(due process requires that juvenile be allowed to question and cross-examine probation officer who prepares transfer report as to any bias, prejudice, or motivation that may have affected case analysis and assessment), citing *Kent*.

The juvenile court may transfer its original jurisdiction to the criminal court pursuant to A.R.S. § 8-327 as follows. The State may request an order of the juvenile court transferring jurisdiction of the criminal prosecution of any felony filed in the juvenile court to the criminal division of the superior court. A.R.S. § 8-327(A). Upon such request, the court shall hold a transfer hearing before the adjudication hearing. A.R.S. § 8-327(B). Under A.R.S. § 8-327(C), the judge must find by a *preponderance of the evidence* both that probable cause exists to believe that the offense was committed and that the juvenile committed the offense, and that the public safety would best be served by the transfer of the juvenile for criminal prosecution. The judge must state *on the*

⁴ Note, this Division 2 case departs from the oft-cited holding in *State v. Marks*, 186 Ariz. 139, 142 (App. 1996) that the superior court is a single unified trial court of general jurisdiction, regardless of departmentalization. See FN 1, *supra*.

record the reasons for transferring or not transferring the juvenile for criminal prosecution.

Pursuant to A.R.S. § 8-327(D), in determining whether the public safety would be served by the transfer of a juvenile for criminal prosecution the court must consider: (1) the seriousness of the offense involved; (2) the record and previous history of the juvenile, including previous contacts with the courts and law enforcement, previous periods of any court ordered probation and the results of that probation; (3) any previous commitments of the juvenile to juvenile residential placements and secure institutions; (4) if the juvenile was previously committed to the department of juvenile corrections for a felony offense; (5) if the juvenile committed another felony offense while the juvenile was a ward of the department of juvenile corrections; (6) if the juvenile committed the alleged offense while participating in, assisting, promoting or furthering the interests of a criminal street gang, a criminal syndicate or a racketeering enterprise; (7) the views of the victim of the offense; (8) if the degree of the juvenile's participation in the offense was relatively minor but not so minor as to constitute a defense to prosecution; (9) the juvenile's mental and emotional condition; and (10) the likelihood of the juvenile's reasonable rehabilitation through the use of services and facilities that are currently available to the juvenile court. These are the same factors listed under A.R.S. § 13-504(D), which are considered by the criminal court in determining whether to transfer a discretionary direct file to juvenile court.

Finally, at the conclusion of the transfer hearing, the court must make a written determination whether the juvenile should be transferred to the criminal division of the superior court for criminal prosecution. The court shall not defer the decision as to the

transfer. If the court determines that the juvenile should not be transferred to the criminal division of the superior court, the court shall set an adjudication hearing. A.R.S. § 8-327(E).

- Note: the sentence stating the court "shall not defer the transfer decision" means the court may not defer the transfer decision in order to consider subsequent conduct. This language was placed in A.R.S. § 8-327(E) by the legislature to foreclose the deferred transfer program added by ASC as former Juvenile Rule 14.1 in response to the COA's holding that the juvenile court had no authority to continue a transfer hearing to consider subsequent conduct in making the transfer determination. See *State ex rel. Romley v. Superior Court*, 172 Ariz. 109, 112 (App. 1992) ("If the Arizona Supreme Court had intended to give the juvenile court the discretion to continue the transfer hearing so that it could consider the juvenile's subsequent conduct, it would have included a specific provision to this effect in [Rule 14]."); *Maricopa County Juvenile Action No. JV-511576*, 186 Ariz. 604, 607 (App. 1996) (counsel found ineffective for failing to argue for application of Rule 14.1, juvenile transfer deferral program). That deferred transfer program was the subject of numerous special actions; that last sentence was the legislative fix.

Juvenile Rule 34 governs the procedure for a transfer hearing as follows.

A. Initiation. If, in the opinion of the prosecutor, the juvenile is not a proper person over whom the juvenile court should retain jurisdiction, the prosecutor may file a motion with the clerk of the court requesting that the juvenile court waive jurisdiction and order the transfer of the juvenile to the appropriate court for criminal prosecution.

B. Motion and Complaint. A copy of the motion for transfer shall be accompanied by a criminal complaint which clearly designates the offense or offenses for which transfer is sought. The motion and complaint shall be filed with the clerk of the court.

1. Amendment to Complaint. Upon motion by the prosecutor, the court may amend the petition at any time before the transfer decision is made to conform to the evidence, but the juvenile shall not be transferred or held to answer for an offense different from the offense for which probable cause was found at the transfer hearing.

C. Service. Copies of the motion and complaint shall be served pursuant to Rule 15. An amended complaint shall be served upon the parties in the same manner as the original motion and complaint.

D. Time Limits. The motion and complaint shall be filed within fifteen (15) days of the date of the advisory hearing, except where permitted by the court upon a finding that good cause exists to delay the filing of the motion for transfer and that the juvenile will not suffer substantial prejudice as a result of the delay.

E. Transfer Investigation. Upon receipt of the motion for transfer, the juvenile probation officer shall conduct a transfer investigation and make a written report specifically addressing those issues which the court considers in determining whether to transfer the juvenile, as provided by law. A copy of the report shall be given to all parties or counsel not less than five (5) days prior to the transfer hearing unless the time is waived by the parties or their counsel.

1. Evaluation of Juvenile. At the time of the filing of the motion for transfer or subsequent thereto, the court, upon its own motion or at the request of any party may order that the juvenile submit to physical, psychological and/or psychiatric evaluations. The reports of experts made pursuant to this rule shall be submitted to the court within ten (10) working days of the completion of the examination and shall be made available to all parties, except that any statement or summary of the juvenile's statements concerning the offense charged shall be made available only to the juvenile. Upon receipt, court staff will copy and distribute the expert's report to the court and counsel for the juvenile. Counsel for the juvenile is responsible for editing a copy for the prosecutor which is to be returned to court staff within twenty-four (24) hours of receipt and made available to the prosecutor.

2. Prior Transfer. If the juvenile has previously been transferred for criminal prosecution by any juvenile court of this state, the court, in its discretion, may waive the provisions of (E) and (E1) above at any time before the hearing. Any prior orders of transfer, probation reports or reports pertaining to physical, psychological or psychiatric evaluations conducted as part of the prior transfer proceedings shall be provided to the parties and counsel.

3. Incompetence. The court shall not transfer a juvenile for criminal prosecution who is not competent.

F. Transfer Hearing. A transfer hearing shall be conducted only by a judge, except as provided in Ariz. R. Sup Ct 91(f). The transfer hearing shall be conducted in two phases which shall include a determination of probable cause whether an offense was committed and whether the juvenile committed the alleged offense and a determination whether public safety would best be served by the transfer of the juvenile for prosecution. The two phases may be heard consecutively or on separate dates as determined by the court.

1. Time Limits. A transfer hearing shall be held within thirty (30) days of the advisory hearing, except where the motion for transfer is filed after the advisory

hearing, in which case the transfer hearing shall be held within thirty (30) days of the filing of the motion for transfer. The court may continue the hearing for good cause.

a. Waiver. The juvenile may waive an evidentiary hearing on either phase of the transfer proceeding. The evidentiary hearing on the probable cause phase of the transfer proceeding may be waived by written waiver, signed by the juvenile, the juvenile's counsel and the prosecutor. Prior to the acceptance of a waiver, the court shall inform the juvenile of the consequences of a waiver and the rights, pursuant to Rule 5.3 and 5.4(c), Ariz. R. Crim. P., which the juvenile is waiving. The court shall make written findings by minute entry or order of the waiver.

2. Probable Cause Determination.

a. Applicable Rules. The probable cause determination shall be conducted in accordance with Rules 5.3 and 5.4(c), Ariz. R. Crim. P., and shall be on the record. The probable cause phase of the transfer hearing or a waiver thereof pursuant to these rules, shall constitute compliance with the defendant's right to a preliminary hearing under Rule 5, Ariz. R. Crim. P.

b. Evidence. Objections to evidence on the ground that it was acquired by unlawful means shall be inapplicable in the probable cause hearing.

c. Probable Cause Finding. If the court finds there is probable cause to believe that the offense has been committed and that the juvenile committed it, the court shall proceed to the public safety determination. If the court does not find probable cause as to the offense charged, the court may find probable cause as to lesser included offenses.

d. No Probable Cause Finding. If the court finds that probable cause does not exist, the court shall dismiss the complaint without prejudice.

e. Certified Transcript of Proceeding. The certified transcript of the probable cause phase of the hearing shall be filed with the clerk of the superior court within twenty (20) days of the completion of the hearing if the juvenile is to be transferred.

3. Public Safety Determination. In determining whether public safety would best be served by transferring the juvenile, the court shall consider those factors as provided by law.

4. Order of Transfer. If the court determines that transfer is appropriate, the court shall state its reasons in writing in the form of a minute entry or order. [See also A.R.S. § 13-504(E).

5. No Transfer. If the court determines that transfer is not appropriate, the court shall dismiss the motion to transfer and shall set an adjudication hearing within thirty (30) days of the order of dismissal. The complaint shall serve as the petition for purposes of further juvenile proceedings if transfer is denied.

A.R.S. § 8-327 does not direct the court to weigh any one factor more than another. In determining that the public safety would be best served by transferring the case for adult prosecution, the court reviews the available evidence as it applied to each of the relevant statutory factors in A.R.S. § 8–327(D). *In re Edgar V.*, 215 Ariz. 77, 79, ¶¶ 8- 9 (App. 2007). The court weighs each factor as against or in favor of transfer, and in reaching its decision may articulate additional concerns supporting transfer. *Id.* at 79-80, ¶¶ 10-12. But as dictated by the statute, the court's “paramount concern” is whether the transfer would serve to protect the public. *Id.* at 80, ¶ 13.

The decision by the juvenile court to transfer a juvenile for prosecution as an adult will not be overturned absent a clear abuse of discretion. *Coconino County Juvenile Action No. J-9896*, 154 Ariz. 240, 741 P.2d 1218 (1987); *In re Mario L.*, 190 Ariz. 381, 383, 948 P.2d 998, 1000 (App. 1997). The appellate court will not substitute its judgment for that of the juvenile court, and will sustain the court's order if reasonable evidence in the record supports it. *In re Edgar V.*, 215 Ariz. 77, 78, ¶ 5 (App. 2007); *Coconino County Juvenile Action No. J-9896*, 154 Ariz. at 244. The juvenile court is accorded this discretion because, in an unbiased manner, it observes the demeanor of the witnesses and the participants. *Maricopa County Juvenile Action No. J-94518*, 138 Ariz. 287, 290 (1983); *Coconino County Juvenile Action No. J-10359*, 157 Ariz. 81, 89,

(App. 1987). The juvenile court is not bound by the recommendations made by psychologists. *In re Edgar V.*, 215 Ariz. 77, 80, ¶ 11 (App. 2007), citing *Coconino County Juv. Action No. J-9896*, 154 Ariz. 240, 243 (1987)

IV. SENTENCING ISSUES

A. Probation Dual Jurisdiction: A.R.S. § 13-921

A.R.S. § 13-501(F) provides: "Except as provided in § 13-921, a person who is charged pursuant to this section shall be sentenced in the criminal court in the same manner as an adult for any offense for which the person is convicted.

A.R.S. § 13-921 is entitled "Probation for defendants under 18 years of age; dual adult juvenile probation." A.R.S. § 13-921(A) permits a court to place a defendant who is under the age of 18 on probation if he or she is convicted of a felony, has not been sentenced to a term of imprisonment, and has no historical prior felony conviction. A defendant who is placed on probation pursuant to § 13-921 is deemed to be on adult probation, § 13-921(C), although the court may also order the defendant to participate in services available through the juvenile court, § 13-921(D).

If the defendant successfully completes the terms and conditions of probation, the court may set aside the judgment of guilt, dismiss the information or indictment, expunge the defendant's record and order the person to be released from all penalties and disabilities resulting from the conviction. A.R.S. § 13-921(B)(1).

Except:

- the conviction may be used as a conviction if it would be admissible pursuant to § 13-703 (repetitive offenders) or 13-704 (dangerous offenders) as if it had not been set aside and the conviction may be pleaded and proved as a prior conviction in any subsequent prosecution of the defendant, § 13-921(B)(2);

- conviction is deemed to be a conviction for the purposes of §§ 28-3304, 28-3305, and 28-3306 (revocation / suspension of driver license), and 28-3320 (suspension of license of persons under 18), § 13-921(B)(3);
- the defendant must comply with §§ 13-3821 and 13-3822 (sex offender registration and notice of moving residence or change of name), § 13-921(B)(4).

The court may order that a defendant placed on probation pursuant to this section be incarcerated in a county jail at whatever time or intervals, consecutive or nonconsecutive, that the court determines. The incarceration may not extend beyond the period of court ordered probation, and the length of time the defendant actually spends in a county jail may not exceed one year. A.R.S. § 13-921(E). Finally, in addition to the provisions of this section, the court may apply any of the provisions of § 13-901 (adult probation). A.R.S. § 13-921(F).

A.R.S. § 13–921 need not be expressly invoked at the time of sentencing for a defendant who meets the criteria in subsection (A) of that statute to seek relief under subsection (B). *State v. Sanchez*, 209 Ariz. 66, 70, ¶ 15 (App. 2004)(rule of lenity dictated interpreting statute to allow former probationer, who had been criminally charged as adult when he was 16 years old, pleaded guilty, and successfully completed 4 years of intensive probation, to expunge record of conviction of attempt to assist criminal syndicate, even though sentencing court had not expressly invoked the statute at sentencing).

B. Death / Natural Life

1. SCOTUS

Four SCOTUS cases address at length special sentencing considerations for crimes committed by juvenile offenders, and careful review of these cases is important

to understanding how this area of law is developing. They are: *Roper v. Simmons*, 543 U.S. 551 (2005), holding that imposing the death penalty for a homicide committed by a juvenile violates the Eighth Amendment; *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010), holding that imposing a life sentence with no parole for a non-homicide offense committed by a juvenile violates the Eighth Amendment; *Miller v. Alabama*, 132 S. Ct. 2455 (2012), holding that imposing a mandatory life sentence with no parole for a homicide committed by a juvenile, with no individualized consideration for the circumstances of the juvenile, violates the Eighth Amendment; and, most recently, *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), holding that *Miller's* prohibition of natural life for a homicide committed as a juvenile absent consideration of the special circumstances of youth, is a new substantive rule retroactive to offenders seeking collateral review.

These cases are rooted in the Eighth Amendment's prohibition against cruel and unusual punishment, which guarantees individuals the right not to be subjected to excessive sanctions. That right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense. The concept of proportionality is central to the Eighth Amendment, and the Court views that concept less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society. *Miller*, 132 S.Ct. at 2463, *citing Roper*, 543 U.S. at 560, *Graham*, 130 S.Ct. at 2021.

These cases emphasize that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. The Court reasoned that because the heart of

the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. *Miller*, 132 S. Ct at 2465. In *Miller*, the Court stated:

So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. ... And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Id. at 2468.

In *Miller*, the Court declined to reach the issue of whether the Eighth Amendment requires a categorical bar on life without parole for juveniles, holding only that the sentencer must take into account “how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” However, the Court cautioned: “[G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” *Id.* at 2469.

Significantly, the Court rejected the argument that the individualized circumstances of a juvenile offender need not be considered at criminal sentencing because they have already come into play in deciding whether to try the juvenile as an adult. Although nearly all states allow juveniles to be tried in adult court for certain crimes, most do not have separate penalty provisions for such offenders and thus apply generally applicable penalty provisions without regard to age. *Id.* at 2473. Further, mandatory transfer schemes or those lodging discretion exclusively with prosecutors, with no statutory mechanism for judicial reevaluation, are silent regarding standards, protocols, or appropriate considerations for decision-making. *Id.* at 2474. Finally, even transfer in discretion of the juvenile court presents dramatically different considerations than those at issue at a criminal sentencing:

Because many juvenile systems require that the offender be released at a particular age or after a certain number of years, transfer decisions often present a choice between extremes: light punishment as a child or standard sentencing as an adult (here, life without parole). In many States, for example, a child convicted in juvenile court must be released from custody by the age of 21. Discretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term *with* the possibility of parole or a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate. For that reason, the discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court—and so cannot satisfy the Eighth Amendment.

Miller at 2474-75.

Therefore, neither A.R.S. § 13-501, § 13-504, nor the transfer criteria considered in transferring a juvenile to adult court under A.R.S. § 8-327 or in older cases, former

Juvenile Rule 14, may be substituted for consideration of the individualized circumstances of a juvenile offender at that offender's adult criminal sentencing.

Finally, *Montgomery v. Louisiana* concerns collateral review of *Miller* claims. There, a juvenile murdered a deputy sheriff in 1963 and was sentenced to death. After retrial, he was sentenced to mandatory life with no parole; under state law he was not allowed to present any mitigation, including his young age. After *Miller* was decided, he was denied collateral review in state court. SCOTUS considered whether *Miller*'s prohibition on mandatory life without parole for juveniles announced a new substantive rule that must be retroactive. The Court stated:

The only difference between *Roper* and *Graham*, on the one hand, and *Miller*, on the other hand, is that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.

136 S.Ct. at 734.

- Note: In *State v. Valencia*, 241 Ariz. 206, ¶ 14 (2016), ASC explained that *Miller*, as interpreted by the majority in *Montgomery*, did not adopt merely a procedural rule requiring individualized sentencing (as distinct from mandatory sentences of life without parole), but instead recognized that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption. *Miller* reflects a substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.

Montgomery concluded that *Miller* is retroactive to juvenile offenders seeking collateral review in state court, reasoning *Miller*'s conclusion that life with no parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution. The Court noted this does not mean states must re-litigate sentences, let alone convictions, in every case where a juvenile

received mandatory life with no parole, and suggested a state may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole rather than resentenced. This would ensure juveniles "whose crimes reflected only transient immaturity – and who have since matured –" would not be forced to serve a disproportionate sentence. *Id.*, 136 S.Ct.at 736.

See also *State v. Valencia*, CR-16-0156-PR, 2016 WL 7422256, ¶ 15 (Dec. 23, 2016)(*Miller*, as clarified by *Montgomery*, represents a “clear break from the past” for purposes of Rule 32.1(g); because *Miller* reflects a new substantive rule of constitutional law, the court is required by *Montgomery* to give this rule retroactive effect); Significant Change in the Law, *infra*.

2. Arizona

i. Parole Eligibility: A.R.S. 13-716

Effective July 24, 2014, A.R.S. § 13-716, entitled “Juvenile offenders sentenced to life imprisonment; parole eligibility,” provides:

Notwithstanding any other law, a person who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years for an offense that was committed before the person attained eighteen years of age is eligible for parole on completion of service of the minimum sentence, regardless of whether the offense was committed on or after January 1, 1994. If granted parole, the person shall remain on parole for the remainder of the person's life except that the person's parole may be revoked pursuant to § 31-415.

Effective the same date, A.R.S. § 41-1604.09(I) was amended to establish parole eligibility for juveniles sentenced to life imprisonment. A.R.S. § 41–1604.09(I), which governs parole eligibility certification, states that the certification system applies to a person “who commits a felony offense before January 1, 1994,” and a person “who is

sentenced to life imprisonment and who is eligible for parole pursuant to § 13–716.” A.R.S. § 13–716 and A.R.S. § 41–1604.09(I) thus establish parole eligibility for juveniles sentenced to life imprisonment.

These changes followed *Miller*. The Legislature abolished parole in 1993 for all offenders who committed offenses after January 1, 1994, and replaced it with a system of earned release credits with no ready application to an indeterminate life sentence; the only possibility for release was through a pardon or commutation by the governor under A.R.S. § 31–402(C)(4). Thus, in Arizona, a sentence of life imprisonment without parole imposed on a juvenile was, in effect, mandatory, in violation of *Miller*. The Legislature's enactment of § 13-716 provides a juvenile sentenced to a 25-year-to-life term with some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, thus providing an adequate remedy for *Miller* claims. *State v. Vera*, 235 Ariz. 571, 575-76, ¶¶ 17-18 (App. 2014), *cert. denied*, 136 S. Ct. 121 (2015). A.R.S. § 13-716 is not retroactive nor does it violate the doctrine of separation of powers. It is a remedial statute that implemented parole eligibility for a juvenile at a point in the future when he or she has completed minimum 25 years, and does not alter the juvenile's sentence, create additional penalty, or change sentence imposed. *Id.* at 576-577, ¶¶ 19-22. *But see State v. Randles*, 235 Ariz. 547, 550, ¶ 10 (Div. 2 App. 2014)(finding § 13-716 applies retroactively).

A.R.S. § 13-752 does not in itself violate *Miller* by precluding the sentence from taking into account an offender's age and attendant circumstances; rather, it provides a lesser alternative to a sentence of “natural life,” which renders a defendant ineligible “for commutation, parole, work furlough, work release or release from confinement on any

basis” under § 13-751(A). When the Court in *Miller* counted Arizona among “the 29 jurisdictions mandating life without parole for children,” it did not refer to the sentencing statute, § 13-752, alone, but considered it in the context of the release statute, § 41-1604.09(l), which eliminated parole for offenses committed after 1994. *Vera*, 235 Ariz. at 578, ¶ 26, *quoting Miller*, 132 S.Ct. at 2473 & n. 13. By enacting § 13-716, the Arizona legislature remedied that circumstance and provided juvenile defendants sentenced to life an opportunity for parole, consistent with the meaningful opportunity for release contemplated by *Miller* and *Graham*. *Id.* at ¶ 27.

Therefore, since a state may remedy a *Miller* violation by “permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them”, *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016), these statutory charges remedy sentences imposed in violation of *Miller* by permitting juvenile homicide offenders to be considered for parole. However, A.R.S. § 13-716 does not apply to juveniles sentenced to natural life. See: *State v. Valencia*, 241 Ariz. 206, ¶ 19 (2016); Significant Change in the Law, *infra*.

ii. Post-conviction Issues

a. Newly Discovered Evidence

In *State v. Amaral*, 239 Ariz. 217, ¶¶ 15-19 (2016), the Arizona Supreme Court held that advances in juvenile psychology and neurology made long after conviction for crimes committed as a juvenile do not constitute a colorable post-conviction claim of newly discovered evidence where the trial court considered the distinctive attributes of youth at sentencing. There, the juvenile pleaded guilty in 1993 to 2 counts first-degree murder and other crimes committed when he was 16; he was sentenced to consecutive

life sentences and must serve 57.5 years before becoming eligible for parole. At sentencing, the court considered his mental health and immaturity as well as his sexual abuse by a counselor, but found no mitigation other than his age which would justify concurrent sentences. In 2012, he sought post-conviction relief based on newly-discovered evidence; namely, recent scientific findings regarding juvenile psychology and neurology which were cited by SCOTUS in *Roper*, *Graham*, and *Miller*.

The Court noted that under Rule 32.1(e), Ariz. R. Crim. P., newly-discovered evidence must appear on its face to have existed at the time of trial, but discovered only after trial. The Court held assuming the advances in juvenile psychology and neurology as described by SCOTUS are true, the juvenile failed to show they would have altered his sentences because these advances only supplement the existing knowledge of juvenile behavior considered at his sentencing. *Id.*, ¶¶ 15-17. The Court distinguished this from *State v. Bilke*, 162 Ariz. 51, 52 (1989), in that Bilke suffered from PTSD, a condition that existed at the time of trial but was not yet recognized by mental health professionals and thus could not be diagnosed until years after his trial. Here, the defendant's juvenile status and impulsivity were known and explicitly considered by the trial court at the time of sentencing; unlike Bilke, his condition was not newly-discovered. Further, it probably would not have changed the result. *Id.*, 18. Finally, the Court held although the scientific advances had yet to be discovered, it is the condition – not the scientific understanding of the condition – that needs to exist at the time of sentencing. Just because the understanding of juvenile mental development had increased does not mean the behavioral implications of the defendant's juvenile status were newly discovered. *Id.*, ¶ 19.

b. Significant Change in the Law

In *State v. Valencia*, 241 Ariz. 206, ¶ 14 (2016), ASC explained that *Miller*, as interpreted by the majority in *Montgomery*, did not adopt merely a procedural rule requiring individualized sentencing (as distinct from mandatory sentences of life without parole), but instead recognized that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption. *Miller* reflects a substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity. Thus, *Miller*, as clarified by *Montgomery*, represents a “clear break from the past” for purposes of Rule 32.1(g); because *Miller* reflects a new substantive rule of constitutional law, it has retroactive effect. *Id.*, ¶ 15.

There, two defendants were sentenced to natural life for murders committed as juveniles. Each sought post-conviction relief under *Miller v. Alabama*; in each case the trial court summarily denied relief after finding the defendant's youth had been considered in compliance with *Miller*. Afterward, SCOTUS decided *Montgomery*. With regard to one defendant, the trial court concluded the sentencing court had complied with *Miller* because it had considered the juvenile's age as a mitigating factor before imposing a natural life sentence. The trial court also observed that any constitutional infirmity in Arizona's sentencing scheme had been resolved by 2014 statutory amendments that reinstated parole for juvenile offenders who received life sentences with the opportunity of release. *Id.*, ¶ 5, citing A.R.S. §§ 13-716, 41-1604.09; *State v. Vera*, 235 Ariz. 571, 576 ¶ 18 (App. 2014). With regard to the other defendant, the trial court concluded the natural life sentence did not violate *Miller* because that sentence

was not mandatory, but instead was imposed after the sentencing court had considered the defendant's age and other mitigating factors. That court also ruled that the 2014 amendments remedied any constitutional infirmity in the previous sentencing scheme. *Valencia*, ¶ 6.

On review by the court of appeals, the defendants argued that under *Miller*, Arizona's sentencing scheme for juveniles convicted of murder is unconstitutional because it permits imposition of natural life without consideration of the special circumstances of youth. Division 2 agreed, and concluded that even though the trial court had considered the defendants' ages when imposing natural life, *Montgomery* requires more than mere consideration of age. That Court remanded for resentencing. *State v. Valencia*, 239 Ariz. 255, 259, ¶ 17 (App. 2016), *review granted* (Sept. 20, 2016), *vacated*, *State v. Valencia*, 241 Ariz. 206 (2016).

ASC accepted review and vacated that decision, holding instead that the defendants were entitled to an evidentiary hearing, not resentencing. *State v. Valencia*, 241 Ariz. 206, ¶ 14 (2016). The Court rejected the State's argument that *Miller* requires only that the sentencing court consider the juvenile's age as a mitigating factor before imposing a natural life sentence, noting that *Montgomery* expressly held that *Miller* reflects a substantive rule and that even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity. *Id.*, ¶ 16.

ASC held that in order to be entitled to resentencing, the defendants must also establish, pursuant to Rule 32.1(g), that *Miller*, if determined to apply, would probably

overturn their sentences. But the retroactivity of *Miller* and the failure of the sentencing courts to expressly determine whether the juvenile defendants' crimes reflected irreparable corruption did not in themselves entitle the defendants to relief. “*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility,' but instead held that imposing a sentence of life without parole on 'a child whose crime reflects transient immaturity' violates the Eighth Amendment.” *Id.*, ¶ 17, *quoting Montgomery*, 136 S.Ct. at 736.

The Court concluded that the defendants were entitled to evidentiary hearings on their Rule 32.1(g) petitions because they made colorable claims for relief based on *Miller*. At these hearings, they will have an opportunity to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity. Only if they meet this burden will they establish that their natural life sentences are unconstitutional, thus entitling them to resentencing. If the State does not contest that the crime reflected transient immaturity, it should stipulate to the defendant's resentencing in light of *Montgomery* and *Miller*. *Valencia*, ¶ 18.

Finally, ASC noted that the need for such evidentiary and resentencing hearings could be obviated by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. “While this result could be achieved by the legislature amending A.R.S. § 13-716 to apply to inmates serving natural life sentences for murders committed as juveniles, it is not a change that can be mandated by judicial decision. *Id.*, ¶ 19.

In the concurring opinion of *Valencia*, Justice Bolick, joined by Justice Pelander, opined that in *Montgomery*, the Court created a substantive rule that did not exist in

Miller, namely, that courts must make a finding of irreparable corruption before sentencing a juvenile offender to life imprisonment without parole, rendering *Miller*, as modified, retroactive. "As a result, Arizona, like many other states, must now reconsider sentences imposed in some instances many decades ago, in a largely unguided effort to determine today whether people long behind bars were irreparably corrupted when they committed the murders underlying their convictions." *Id.*, ¶ 26. "But even more troubling from a practical standpoint is the Court's sweeping pronouncement that the 'vast majority' of juvenile offenders must be shielded from lifetime confinement. *Id.*, ¶ 28

The concurring opinion concluded, "We should treat the Court's forecast that irreparable corruption will not be found in the "vast majority" of cases as speculative and dictum," and that "[w]ithin this nebulous construct, sentencers should apply their best judgment, assessing all relevant factors." "Our system's integrity and constitutionality depend not on whether the overall number of sentences of life without parole meted out to youthful murderers are many or few. They depend primarily on whether justice is rendered in individual cases." *Id.*, ¶ 30.

iii. Habeas Review

For purposes of federal habeas review, a geriatric release program, when applied to a juvenile offender sentenced to life without parole for a non-homicide offense, is not an unreasonable application of *Florida v. Graham*. *Virginia v. LeBlanc*, __ U.S.__ (June 12, 2017). A state prisoner is eligible for federal habeas relief if the underlying state court merits ruling was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by SCOTUS. In order for a state court's decision to be an unreasonable application of the Court's case law, a

litigant must show that the state court's ruling was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement; this is meant to be a difficult standard to meet. In *LeBlanc*, the Court explained that *Graham* did not decide that a geriatric release failed to satisfy the Eighth Amendment because that question was not presented, and it was not objectively unreasonable for the state court to conclude that because the geriatric release program employed normal parole factors, it satisfied *Graham's* requirement that juveniles convicted of a non-homicide crime have a meaningful opportunity to receive parole. The Court noted there are reasonable arguments on both sides with respect to the issue, but those arguments cannot be resolved on federal habeas review.